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In The

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1251

JOHN C. SWAN, *Petitioner*

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN C. SWAN, per se
6142 S.W. Huber
Portland, Oregon 97219
Petitioner

HOUGHTON-CARSON COMPANY, PORTLAND, OREGON

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No. _____

JOHN C. SWAN, *Petitioner*

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

John C. Swan, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on January 10, 1968, and a Petition for a Rehearing was denied on February 20, 1968.

JUDGMENTS AND OPINIONS BELOW

The judgment of the District Court below (Appendix B) has not yet been reported.

The opinion of the Court of Appeals below (Appendix A) has not yet been reported.

JURISDICTION

This is a criminal prosecution charging the petitioner, as defendant, with a violation of Section 472, Title 18, United States Code, in passing and uttering a counterfeited obligation and security. The defendant, in a trial with a jury, was found guilty and sentenced to two years and become eligible for parole at such time as the Board of Parole may determine.

The affirming judgment of the Court below (Appendix C, infra, p. 15) was entered January 10, 1968. A timely petition for rehearing was denied on February 20, 1968 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Whether it is proper or even constitutional for the lower courts to ignore the obvious fact that the defendant's substantial constitutional rights as envisioned in the Miranda and Escobeda precepts have been violated, despite the fact that defendant's trial attorney made no objection?

2. Whether it is proper or even constitutional for the trial court to admit into evidence an item whose only probative value is that the defendant may have known an individual who had been under investigation by the Government, and therefore the defendant must be guilty by association?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. Amendment V, U.S. Constitution:

"No person . . . shall be deprived of life, liberty or property, without due process of law."

2. Amendment IX, U.S. Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

3. 18 U.S.C. §472 (1948).

Uttering counterfeit obligations or securities:

"Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or with like intent brings into the United states or keeps in possession or conceals any falsely made, forged, counterfeited, or altered abligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years or both.

4. Rule 52(b), Federal Rules of Criminal Procedure:

"Plain error. — Plain errors or defects affecting substantial right may be noticed although they were not brought to the attention of the court."

STATEMENT

There are set forth below only enough facts to place the foregoing questions in their setting.

Your petitioner was indicted under the above-entitled statute on September 13, 1966. The jurisdiction of the District Court was founded on said statute and 18 U.S.C. §2314. The indictment is as follows (omitting the title and caption):

"That on or about July 13, 1966, at Salem, within the District of Oregon, JOHN C. SWAN, defendant, wilfully, knowingly, feloniously and with intent to defraud, did pass and utter counterfeited obligation and security of the United States at the Silver Inn Lounge, Salem, Oregon, to-wit: a ten dollar Federal Reserve note on the Federal Reserve Bank of Richmond, check letter "G", face plate number 3, back plate number 4 ,bearing serial No. E42566893A; in violation of Section 472, Title 18, United States Code."

This case presents a close factual question as to who in fact passed the bill. Defense introduced as evidence the fact that one of defendant's companions, not the defendant, was at the scene of the alleged criminal activity (Tr. 168-169). The basic problems raised by this case concern themselves with evidence of purported admissions of the defendant and testimony concerning a man allegedly involved in counterfeit whose name was found in defendant's possession (Tr. 127).

A Government's witness testified that he searched and seized a notebook which the defendant had on his person. The notebook was introduced into evidence (Tr. 126) over defendant's objection as Government's Exhibit #2, after the District Court itself had expressed concern over its efficacy (Tr. 124). The only reason why the Government introduced the notebook was to show that it contained the name of a person who the Government had been investigating for alleged counterfeiting activities. In other words, the Government attempted to prejudice the defendant by showing that he may know

a culprit; this, it is respectfully submitted, is an attempt at guilt by association. The theory is that since the defendant knew a suspected counterfeiter he must have been involved in similar activities. This was the sole purpose of admitting the notebook; so the jury would jump to such a conclusion. This, it is submitted, is a violation of the elementary concepts of our criminal jurisprudence as enunciated by this Court. If this attempt at guilt by association is countenanced, the prevalence with which this concept may be employed in the future is not pleasant to ponder.

The record is replete with evidence admitted in violation of Miranda v. Arizona. The court admitted wholesale admissions made by defendant to the arresting officer (Tr. 145, 146). No attorney was present when these were made; in fact, the Government suggested that the defendant did not need an attorney (Tr. 11, 12, 17-18). It was further brought out that defendant was not warned of his right to remain silent at the time of the arrest (Tr. 26-27). The court in its preliminary determination as to the admissibility of these statements found that they were not admissible under the Miranda decision. Disregarding this ruling, the Government brought them out anyway during the trial (Tr. 145). Defendant's counsel failed to make proper objections to this testimony. However, it is submitted that under Rule 52(b) of the Federal Rules of Criminal Procedure that the lower courts should have noticed the errors anyway. The record is full of objectionable material under Mir-

anda for which no objection was interposed by defendant's former counsel. They were not assigned as error in the court below. However, it is respectfully submitted that they should be noticed by this Court under its supervisory powers in order to prevent a grave miscarriage of justice.

The defendant was convicted and the Court of Appeals affirmed the judgment. However, since the defendant's former counsel did not make proper objection there was concededly very little the court could do. However, your petitioner urges that if this Court ignores the errors, grave injustice would result.

REASONS FOR GRANTING THE WRIT

1. Admissibility of Pre-trial Admissions

The decision of the Ninth Circuit is believed to be in conflict with decisions of this Court construing Rule 52(b) of the Federal Rules of Criminal Procedure, and involves important constitutional questions in the construction of the applicability of the recent landmark decision of *Miranda v. State of Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602.

The lower courts completely ignored the fact that the record was replete with pre-trial admissions made by the defendant were admitted into evidence in violation of the Miranda decision. However, no objection was made by petitioner's former counsel, despite the fact that the District Court had ruled such evidence inadmissible at the outset of the trial. Rule 52(b) of the Federal Rules

of Criminal Procedure say that plain errors affecting substantial rights may be notice even without an objection. In *Fisher v. United States*, 328 U.S. 463, 90 L.Ed. 1382, 66 S.Ct. 1318, this Court held that when the substantial rghts of the defendant are affected the Supreme Court may notice material error even though the error was not specifically brought to the attention of the lower courts. In *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 91 L.Ed. 973, 63 S.Ct. 775 it was also held that the Supreme Court has the power to notice plain error

It is respectfully urged that when the constitutional rights of a defendant are violated they must be noticed and protected by the lower courts with or without objection. Only the defendant with a full understanding of the consequences may waive his right. The Miranda decision promulgates the philosophy that an accused's rights must be jealously guarded as soon as he is arrested. It is suggested that a defendant's rights are not waived by his trial counsel's failure to object. To rule otherwise could lead to an incongruous situation of the defendant's rights being jealously protected by the police before trial, but waived by defense counsel's action during trial. This, it is suggested, would be a denial of due process of law.

It is strongly urged that certiorari must be granted in this case to clarify this situation.

2. Guilt by Association

The Ninth Circuit, in affirming the conviction below, gave its approval to the Government's attempt to obtain a conviction based on guilt by association. The Court gave approval to the District Court's ruling that it was permissible to admit into evidence a notebook seized from the petitioner whose only relevance was that it contained the name of a person the Government had been investigating. This, it is suggested, is a violation of due process of law and the Ninth Amendment, and thereby necessitates this Court's power of supervision.

The theory of the Government in offering the notebook was to show that since the defendant may know an alleged counterfeiter the jury may jump to the conclusion that he must be involved with counterfeiting himself. In other words, if a person associates with an alleged criminal then that person is also a criminal according to the Government. What other reason could there be to let the Government's exhibit in; it is suggested that the United States contends that the defendant is guilty because he associates with an alleged criminal.

It has been basic under Anglo-American Criminal jurisprudence that the prosecution must prove the defendant did the deeds alleged in the Indictment; the burden is on the Government. To obtain a conviction merely by showing that the accused associated with hoodlums is a denial of due process; indeed it has noth-

ing to do with the charge. Just because a person associates with a wrongdoer does not make him a wrongdoer. The whole import of a decision such as *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 17 L.Ed. 2d 629, 87 S.Ct. 675, which is the latest of a broad range of decisions of this Court, is to shift our country away from the guilt by association philosophy. Who a person associates with and why is irrelevant and indeed no business of the Government except for reasons of national security. The "right to associate" is protected, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 336-337, *DeJong v. State of Oregon*, 299 U.S. 353, 57 S.Ct. 255.

It is further suggested that admitting this exhibit into evidence violates the Ninth Amendment. This Amendment was adopted to secure certain common law rights of people against invasion by the Federal Government, *Bell v. Hood* (DC. Cal.), 71 F.Supp. 813 (1947). The Amendment protects "fundamental" rights, *Davis v. Firment*, 269 F.Supp. 524 (1967).

In *Griswold v. State of Connecticut*, 381 U.S. 488, 85A S.Ct. 1678 (1965), Justice Douglas referred to the Ninth Amendment as protecting fundamental rights. He said that there are certain rights that substantially pre-date the Bill of Rights. Justice Goldberg, on Page 1683, in his concurring opinion, with whom the Chief Justice and Justice Brennan joined, said that these are the rights that are protected by the Ninth Amendment. One of them is the right to privacy; another, it is respectfully submitted, is the right to associate with any person one

desires without fear of facing criminal sanctions because of the companion's criminal behavior. The whole purpose of the Ninth Amendment as proposed by James Madison is to make sure that basic fundamental rights over and above those enumerated in the Bill of Rights are preserved, I Annals of Congress 439 (Gales and Seaton ed. 1834). The freedom from the guilt by association philosophy is one of the elementary rights of United States citizenship, it is submitted.

CONCLUSION

The two questions raised, it is submitted, raise very important federal questions for the reasons set forth above. Although the determination of this case is important to the defendant who will serve a term in prison, it is also important because of the importance to the public. Are citizens of the United States to be denied their constitutional rights because their trial attorney failed to specify them during trial? Is a defendant in a criminal prosecution to be subjected to the guilt by association philosophy long abandoned in time past? Must a person be careful of who he associates with for fear that that person's alleged criminal background may subject the former to criminal liability? All these are very profound and substantial questions.

For these reasons a petition for certiorari should be granted.

Respectfully submitted,

JOHN C. SWAN, per se,
6142 S.W. Huber,
Portland, Oregon 97219.

APPENDIX A

Opinion Below of United States Court of Appeals for the Ninth Circuit

JOHN C. SWAN,)
Appelant,)
vs.) No. 21,715
UNITED STATES OF AMERICA,)
Appellee.)

(January 10, 1968)

On Appeal from the United States District Court for the District of Oregon

Before: BARNES, BROWNING, Circuit Judges, and BOLDT, District Judge

PER CURIAM:

This is an appeal from a Judgment of conviction of passing counterfeit money. Appellant urges three alleged evidentiary errors in the trial court, each of which we have carefully considered. We find no merit in any of them.

The judgment of conviction is affirmed.

APPENDIX B

Judgment and Commitment by United States District Court

UNITED STATES OF AMERICA,)
vs.)
JOHN C. SWAN,) No. CR 66-190
Defendant.)

On this 7th day of December, 1966 came Norman Sepenuk, the attorney for the government and the defendant appeared in person and by counsel Charles Harvey.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of wilfully, knowingly, feloniously and with intent to defraud, did pass and utter a counterfeited obligation and security of the United States, to wit: a ten dollar Federal Reserve note on the Federal Reserve Bank of Richmond, in violation of Title 18, United States Code, Section 472, as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years and that defendant shall become

eligible for parole at such time as the Board of Parole may determine.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

APPENDIX C

Judgment Below

JOHN C. SWAN,)
Appellant,)
vs.) No. 21,715
UNITED STATES OF AMERICA,)
Appellee.)

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 10, 1968.

APPENDIX D

Order Denying Rehearing

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, February 20, 1968

Before: BARNES, BROWNING, Circuit Judges, and BOLDT, District Judge.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed February 9, 1968, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1251

JOHN C. SWAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 387 F. 2d 950.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1968. A petition for rehearing was denied on February 20, 1968. The petition for a writ of certiorari was filed on March 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the trial court properly received petitioner's admissions to the arresting agent.

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2. Whether petitioner was prejudiced by the receipt of a notebook and accompanying testimony showing that he had associated himself with a person with whom a Secret Service Agent had "discussed counterfeiting matters."

STATEMENT

Petitioner was convicted in the United States District Court for the District of Oregon of uttering a counterfeit obligation in violation of 18 U.S.C. 472. On December 7, 1966, he was sentenced to imprisonment for two years. The court of appeals affirmed *per curiam* (Pet. App. A).

The government's evidence showed that on July 12, 1966, a car registered in petitioner's name drove up to the Silver Inn in Salem, Oregon (Tr. 67–68, 80). While two men remained in the automobile, petitioner entered the tavern, ordered a drink, and paid for it with a ten dollar bill later proved to be counterfeit (Tr. 67–70, 96–98). A waitress decided that the bill was spurious and offered to return it to petitioner, who declined the offer (Tr. 70). Petitioner explained to the waitress that he was hitchhiking through town, and that he might have obtained the ten dollar bill at some other tavern in the city. After more questioning by the waitress, who remarked that it was unusual for the two other men in the car to wait so long for a hitchhiker, petitioner hurriedly returned to the car and left (Tr. 70–71, 74–75, 79). Two other witnesses testified to petitioner's passing of the bill at the Silver Inn (Tr. 82–84, 86–88). Other evidence showed that less than a week before trial, petitioner approached the waitress—then work-

ing at another tavern—and attempted to engage her in a conversation about the forthcoming trial, at which time he admitted being at the Silver Inn on the night in question (Tr. 76–78); that petitioner had passed similar bills in Seattle, Washington (Tr. 107–109, 118–121, 140); and that petitioner had admitted knowledge as to where such counterfeit bills could be purchased from a distributor (Tr. 145–151).

ARGUMENT

1. During petitioner's incarceration following his arrest, he admitted to Secret Service Agent Thomas Moore that the type of ten dollar bill which he had passed could be purchased, ten at a time, for $65.00, and that he knew a person residing in Portland, Oregon, who was selling the bills at that price (Tr. 145–151). These statements were ordered suppressed after a hearing outside the presence of the jury (Tr. 61–62). On cross-examination of Agent Moore, petitioner's counsel asked about the mark-up on the type of bills which petitioner had passed. Agent Moore replied, "I can tell you what the defendant told me." After defense counsel asked, "What did he tell you?", Moore replied that petitioner had stated that "It was the sale of $65 on a hundred" (Tr. 145). Petitioner made no motion to strike this testimony. On re-direct, over petitioner's objection that the line of questioning exceeded that of cross-examination, the prosecution brought out that petitioner had said he knew a person in Portland selling counterfeit money at that price (Tr. 146–151).

In these circumstances, where defendant's counsel invited reception of the suppressed testimony on cross-examination, petitioner should not be heard to invoke application of the plain error rule (F. R. Crim. P. 52(b)). See *United States* v. *White,* 377 F. 2d 908, 910-911 (C.A. 4), certiorari denied, 389 U.S. 884; *Tucker* v. *United States,* 375 F. 2d 363, 367 (C.A. 8), certiorari denied, 389 U.S. 888. The evidence brought out on redirect examination properly clarified that which was brought out on cross-examination—that is, it showed how petitioner had been aware of the going price for counterfeit obligations. This did not exceed the scope of the cross-examination.

2. At the time of petitioner's arrest, a search of his person revealed a notebook containing the entry, "Leroy, Taft, Calif." At trial, Agent Moore testified that he had received investigative reports from other agents alluding to the name "Leroy." This testimony was stricken on motion of petitioner (Tr. 125). Moore then testified, over objection on the ground of hearsay, that he had "discussed counterfeiting matters" with Leroy, whom he identified as Leroy Hults, Naylor Avenue, Taft, California. The court then admitted the notebook into evidence with instructions to the jury that they could give the exhibit whatever weight they felt it was worth (Tr. 126). No further reference was made to the notebook or Leroy. Petitioner chose not to call Leroy, who was present at the trial (Tr. 127), to the witness stand.

Petitioner contends that the reception of the notebook and the accompanying testimony constituted reversible error. It is clear in context, however, that the

evidence was introduced not merely to establish guilt by association, as petitioner first claimed on appeal, but rather to show his guilty knowledge in passing the counterfeit obligation. That petitioner knowingly associated himself with a person with whom the agent "discussed counterfeiting matters" was relevant to that issue of knowledge. Cf. *Banning* v. *United States*, 130 F. 2d 330, 336–338 (C.A. 6), certiorari denied, 317 U.S. 695. Even assuming the inadmissibility of the evidence on the ground of irrelevancy, petitioner was not prejudiced in the circumstances of this case. As noted above, three witnesses observed petitioner pass the counterfeit bill in question, and another observed him pass two similar bills thereafter. Moreover, as noted above, other evidence showed that petitioner had admitted that he knew a man in Portland who sold this type of ten-dollar counterfeit bill, ten at a time, for $65.00. In these circumstances, where the evidence showing petitioner's guilt was overwhelming, the error, if any, was harmless. F.R. Crim. P. 52(a).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

APRIL 1968.

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